IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SEAMUS J. MARTIN	:	**CIVIL ACTION**
	:	
v.	:	
	:	
GEORGE D. WARRINGTON,	:	
NATIONAL RAILROAD PASSENGER	:	
CORPORATION d/b/a AMTRAK,	:	
BUILDING AND BRIDGES DEPARTMENT	:	**NO. 01-1178**

MEMORANDUM ORDER

This case arises from an alleged succession of discriminatory actions and harassment based on national origin by plaintiff's co-workers which resulted in his constructive discharge. Plaintiff has asserted claims for violation of Title VII, the Federal Employee Liability Act ("FELA"), the Railroad Labor Act ("RLA"), and the Pennsylvania Human Relations Act ("PHRA"), as well as claims for intentional infliction of emotional distress and assault and battery. Defendant Amtrak filed a motion to dismiss. Plaintiff responded by filing an amended complaint, and has subsequently filed a second amended complaint. Presently before the court is defendant Amtrak's motion to dismiss the second amended complaint.[1]

---

[1] Mr. Warrington, the CEO of Amtrak, is mentioned only in the caption of the pleading. There is no reference to him in the body of the pleading in which only Amtrak is identified as a party defendant. Amtrak is the only party against whom judgment is sought in each of the counts except those containing the FELA and RLA claims. In those two counts, judgment is sought "against Defendant CF." No such party appears in the caption or is otherwise identified in the pleading. Noone has moved to amend the caption to delete Mr. Warrington as a defendant. Noone has explained who "CF" is or why it would be liable for conduct attributed to Amtrak. Based on plaintiff's actual averments and the absence of service of process on any party other than Amtrak, the court assumes at this juncture that it is the sole defendant herein.

Dismissal for failure to state a claim is appropriate when it clearly appears that plaintiff can prove no set of facts in support of the claim which would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Robb v. City of Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984). Such a motion tests the legal sufficiency of a claim while accepting the veracity of the claimant's allegations. See Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987); Winterberg v. CNA Ins. Co., 868 F. Supp. 713, 718 (E.D. Pa. 1994), aff'd, 72 F.3d 318 (3d Cir. 1995). A court may also consider any document appended to and referenced in the complaint on which plaintiff's claim is based. See Fed. R. Civ. P. 10(c); In re Burlington Coat Factory Securities Litigation, 114 F.3d 1426 (3d Cir. 1997); In re Westinghouse Securities Litigation, 90 F.3d 696, 707 (3d Cir. 1996). A complaint may be dismissed when the facts alleged and the reasonable inferences therefrom are legally insufficient to support the relief sought. See Pennsylvania ex rel. Zimmerman v. PepsiCo., Inc., 836 F.2d 173, 179 (3d Cir. 1988).

The pertinent facts as alleged by plaintiff are as follow.

Plaintiff is a member of the Brotherhood of Maintenance Way Employees Union ("Union") and a lawful immigrant of Irish descent. He was employed pursuant to a collective bargaining

agreement by defendant National Railroad Passenger Corporation, Building and Bridges Department ("AMTRAK") as a brick mason on January 12, 1998. From the first month of employment through March 13, 2000, defendant permitted its employees to engage in a course of national origin discrimination. Plaintiff describes in some detail six instances of harassment by co-workers which occurred between May 1, 1998 and May 15, 1999.

On May 15, 1999, plaintiff complained to the General Supervisor and Senior Foreman. Neither took effective action to stop the harassment. Plaintiff also telephoned Human Resources and was advised to contact the Union. He did so and the Union representative left a message on plaintiff's answering machine. Nobody from the Union, however, returned plaintiff's subsequent calls. On June 10, 1999, through counsel, plaintiff sent a letter to a member of Human Resources, the Chairman of the Union and the Union Representative describing the offensive conduct, requesting that the offending employees be disciplined and asking that plaintiff be transferred. On June 14, 1999, after plaintiff's supervisor retaliated by making a verbal threat to the plaintiff at a remote job site, he fled. Plaintiff was interviewed that same day by Amtrak police to whom he recounted the incidents and requested a transfer from Lancaster to Philadelphia.

Defendant contends that the state common law claims should be dismissed because they are preempted by the FELA, that the RLA claim should be dismissed because plaintiff failed to exhaust his remedy through the National Railroad Adjustment Board, and that the entire complaint should be dismissed pursuant to Fed. R. Civ. P. 12(f) and 41(b) for failure to comply with Rule 8. Subsequent to the filing of the motion to dismiss, plaintiff has stipulated to the dismissal of the two state law tort claims.

In enacting the RLA, Congress sought "to promote stability in labor-management relations in this important national industry by providing effective and efficient remedies for the resolution of railroad-employee disputes arising out of the interpretation of collective-bargaining agreements." Union Pacific R.R. v. Sheehan, 439 U.S. 89, 94 (1978). Accordingly, Congress created the National Railroad Adjustment Board ("Adjustment Board") to hear disputes regarding rates of pay, rules and working conditions. Association of Flight Attendants, AFL-CIO v. U.S. Air, 960 F.2d 345, 347 (3d Cir. 1992); Capraro v. United Parcel Service Co., 993, F.2d 328, 331 (3d Cir. 1993). Congress considered it "essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts." Atchison, Topeka, and Santa Fe R. Co. v. Buell, 480 U.S. 557, 571

(1987).[2] Under the RLA, the Adjustment Board's third division has exclusive jurisdiction over "minor" disputes involving maintenance-of-way employees. See 45 U.S.C. § 153(h)(2001); Andrews v. Louisville & Nashville R.R. Co., 406 U.S. 320, 325 (1972). With limited exceptions, a plaintiff must exhaust his administrative remedies before the Board.

There are four exceptions to the exhaustion rule. The plaintiff is not required to exhaust his remedy through the Board if the employer repudiates the grievance machinery, resort to the administrative remedy would be futile, the employer is joined in a breach of the duty of fair representation claim against the union or because of the breach of the duty of fair representation, the employee loses the right to press his grievance before the Board. Childs, 831 F.2d 437. See also Kashak v. Consolidated Rail Corp., 707 2d. 902, 907 (6th Cir. 1983).

Relying upon Glover v. St. Louis S.F. R. Co., 393 U.S. 324 (1969), plaintiff contends that because both the union and Amtrak were unresponsive to his plight, pursuit of an

---

[2] "Major disputes concern the formation or alteration of collective agreements; minor disputes involve the application of a valid agreement to a specific grievance." Childs v. Pennsylvania Federation Brotherhood of Maintenance Way Employees, 831 F.2d 429, 437 (3d Cir. 1987) (citing Sheehan, 439 U.S. 89, 94 (1978)).

administrative remedy would have been futile.[3] The unresponsiveness of the union and the employer does not render the administrative remedy futile. "A proceeding in arbitration is futile only when, through bias, prejudice or predisposition on the part of the arbitration board, there would be no point in submitting the claim to arbitration." Miklavic, 21 F.3d at 555. Unlike Glover, where the plaintiff contended that the Adjustment Board itself was prejudiced, plaintiff simply contends that the Union and the employer were unresponsive. There is no averment of bias, prejudice or predisposition on the part of the Board.

Plaintiff's RLA claim will be dismissed.

A complaint should contain "a short and plain statement of the claim." Fed. R. Civ. P. 8(a). "[E]ach averment of a pleading shall be simple, concise and direct." Fed. R. Civ. P. 8(c)(1).

While the second amended complaint, like those which preceded it, is no model of brevity, defendant exaggerates the level of detail contained therein. The complaint sets forth six claims in thirteen pages. From the bottom of page two at

---

[3] From the face of the complaint, the other exceptions are inapplicable. Plaintiff does not allege that the employer repudiated the grievance machinery. Although the union did not file a grievance before the Board, plaintiff remained free to do so. See 45 U.S.C. § 153 First (j); Miklavic v. U.S. Air, 21 F.3d 551 (3d Cir. 1994). While plaintiff claims the Union breached its duty of fair representation, the exception involves a situation where the employer is joined in a lawsuit by the plaintiff against the Union for breach of this duty.

paragraph nine through the middle of page eight at paragraph thirty-one, plaintiff sets forth allegations common to all of his claims. In paragraphs sixteen and twenty-seven, plaintiff does describe certain incidents in excessive detail.

While a court may strike a pleading which does not comply with the notice pleading requirements of Rule 8, the exercise of this power should be reserved for a pleading which is "so confused, ambiguous, vague or otherwise unintelligible that its true substance, if any, is well disguised." Simmons v. Abruzzo, 49 F.3d 83, 89 (2d Cir. 1995) (quoting Salahuddin v. Cuomo, 861 F.2d 40, 42 (2d Cir. 1988)). See also Nagel v. Pocono Medical Center, 168 F.R.D. 22 (M.D. Pa. 1996). Where pleadings are laden with unnecessary factual narrative, courts have stricken them.

The cases relied upon by defendant, however, are far more egregious than the instant one. In Burks v. City of Philadelphia, 904 F. Supp. 421 (E.D. Pa. 1995), the complaint was "a fact-laden, 36-page, 128-paragraph narrative that describes in unnecessary, burdensome, and often improper argumentative detail, every instance of alleged racial discrimination." Id. at 424. In Drysdale v. Woerth, 1998 WL 966020 (E.D. Pa. Nov. 18, 1998), the complaint was "a 93 paragraph narrative that describes in unnecessary and burdensome detail every instance of Defendants' alleged misconduct." Id. at *2. In Johns-Manville Sales Corp.

v. Chicago Title & Trust Co., 261 F. Supp. 905 (N.D. Ill. 1966), the complaint devoted thirty-nine pages to a single count and included twenty-four exhibits. Id. at 908.

Indeed, in most of the cases defendant cites, the courts declined to dismiss complaints despite plain violations of Rule 8. In Lundy v. Dermik Laboratories, Inc., 1995 WL 622893 (E.D. Pa. Oct. 17, 1995), the court noted that plaintiff's fifty-nine paragraph complaint failed to comply with Rule 8 but declined to dismiss it. In U.S. ex rel. Holland v. Maloney, 299 F. Supp. 262 (W.D. Pa. 1969), although noting the complaint "openly and flagrantly violate[d] Rule 8(a)," the court addressed the merits. Id. at 263. In Carl Guttman & Co. v. Rohrer Knitting Mills, 86 F. Supp. 506 (E.D. Pa. 1949), the court noted that the complaint was "replete with vague, immaterial and evidential allegations" and a "gross violation of Rule 8," but nonetheless addressed the merits. Id. at 507. In Associated Orchestra Leaders of Greater Philadelphia v. Philadelphia Music Soc. Local 77, of Am. Federation of Musicians, 203 F. Supp. 755 (E.D. Pa. 1962), the court decried the thirty-six page complaint as a "veritable compendium of prolixity," id. at 756, but declined to grant the motion to dismiss. Id. at 760.

While plaintiff includes some unnecessary factual matters, the second amended complaint is not so vague,

convoluted, confusing or unintelligible as to prevent a response or warrant dismissal.

ACCORDINGLY, this day of March, 2002, upon consideration of defendant's Motion to Dismiss Plaintiff's Second Amended Complaint (Doc. #7) and plaintiff's response thereto, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** as to plaintiff's claims under the Railroad Labor Act and for intentional infliction of emotion distress and assault and battery; and, said Motion is otherwise **DENIED**.

BY THE COURT:

_____

JAY C. WALDMAN, J.